Supreme Court, U.S.
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No. 09-432

IN THE
SUPREME COURT OF THE UNITED STATES

GLOBAL NETWORK COMMUNICATIONS, INC.,

Petitioner,

-v.-

CITY OF NEW YORK and CITY OF NEW YORK DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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November 9, 2009

QUESTION PRESENTED

Did the Court of Appeals correctly affirm the District Court's grant of summary judgment to respondents City of New York and its Department of Information Technology and Telecommunications because the City's actions fall squarely within the safe harbor provisions of section 253(c) of the Telecommunications Act of 1996, 47 U.S.C. § 253?

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REASON FOR DENYING THE PETITION

THE COURT OF APPEALS CORRECTLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT. THAT COURT'S ORDER DOES NOT CONFLICT WITH PRECEDENTS OF THIS COURT OR THE OTHER COURTS OF APPEALS.

Petitioner has not demonstrated that the case at bar is appropriate for review by this Court. The City wishes to emphasize two points. First, the Court of Appeals correctly affirmed the grant of summary judgment to the City. Second, contrary to petitioner's argument, there is no conflict between the case at bar and prior precedents of the Court of Appeals for the Ninth Circuit.

(I) In the case at bar, the Court of Appeals decided a narrow issue: whether under section 253 of the Telecommunications Act of 1996, a municipality can deny a franchise to a telecommunications provider on the basis of its ties to organized crime, its past history of fraud, and its debts and arrears. The Court of Appeals concluded that the City had acted within its authority under the safe harbor provisions of section 253(c) of the TCA. That statute protects the authority of local governments to manage public rights-of-way and to require fair and reasonable compensation from telecommunications providers.

Section 253(c) states that:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of the public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

This safe harbor provision preserves from preemption the power of municipalities to manage the use of their sidewalks and roads and to mandate reasonable compensation for private occupancy of such sidewalks and roads. Both the District Court and the Court of Appeals correctly held that, as a matter of law, the City's refusal to grant a franchise to petitioner came within this statutory safe harbor.

The Court of Appeals recognized the City's proper exercise of its management powers to avoid dealing with a convicted criminal, an organized-crime figure, and an untrustworthy business entity:

> On May 30, 2000, the DoITT rejected Petitioner's initial request for a franchise on the grounds that its CEO and sole shareholder, Ronald Massie, is an associate of the Bonnano organized crime family accused of loan sharking and money laundering through the company. Massie subsequently pleaded guilty to a

> federal indictment charging him with loan sharking, mail fraud, and bank fraud. ...
>
> The City's actions in this case fall within this "safe harbor" exception. The statutory grant of authority to "manage the public rights-of-way" encompasses the right to reject an applicant on the basis of its affiliation with organized crime, especially upon a demonstrated record of operating the facilities fraudulently, or otherwise in violation of law, with reliance on organized crime to further its business interests. We conclude that the City's refusal to grant Global a franchise to operate on the public rights-of-way on the basis of this past history is fully within the scope of the authority provided by Section 253(c).

Petition at 4a, 10a.

If petitioner's argument is correct, the City would be required to contract, despite the obvious risks, for use of public property with a franchisee with a substantial history of involvement in criminal activities and with a record of fraud on business associates and government and failure to meet its financial obligations. Petitioner's interpretation of the statute is plainly unreasonable.

Petitioner advances the related but distinct argument that the City could have issued a franchise to it and protected its ability to collect compensation by requiring a security bond.

Petition at 16-18. Such a bond, however, would not protect the City from petitioner's fraudulent reporting of its activities on which its obligations are based, a form of misbehavior in which it has engaged in the past. A bond may protect against a contracting party's inability to pay or perform, but it would not protect the City from petitioner's dishonest concealment of its franchise obligations, which is the risk at stake here.

The District Count found that, on the record before it, the City could not trust petitioner to satisfy honestly its business obligations should it receive a franchise:

> No federal law or regulation should be construed to force the City to franchise Global to provide PPT services on New York City's public rights-of-way, when the record shows that Global cannot be expected to pay its obligations to the City in a timely or honest manner. The undisputed evidence supports the City's determination that it need not trust Global to pay the City's compensation in such a manner. Global does not challenge the evidence of its criminal history or nonpayment of interim registry fees. Instead, it argues that the City's franchise denial was not a valid exercise of its authority to manage use of the rights-of-way and to require compensation for such use. But if Global were franchised to operate PPTs on City streets, the City's position would be

> similar to the property owners Massie admitted defrauding

Petition at 32a. Petitioner's argument in this vein lacks merit.

Petitioner argues incorrectly that the administrative precedent of In re New England Public Communications Council, 11 FCC Rcd 19713, 1996 FCC LEXIS 6842 (1996) supports its case. In NE Public, the FCC found that the 253(b) safe harbor from preemption did not apply where the state required a licensing process that barred an entire, broad class of potential entrants. The case at bar is wholly distinguishable, as a case involving the section 253(c) safe harbor, not 253(b), and relating to a single company's publicly documented history of criminal involvement and fraud.

(II) Petitioner argues for a grant of certiorari claiming that the decision at bar is in conflict with three precedents of the Court of Appeals for the Ninth Circuit. Petition at 9-14. There is no such conflict.

There is no conflict between the Courts of Appeals as to basic principles of the TCA. Both Courts of Appeals agree that Section 253(c) provides a "safe harbor" for actions involving management of the rights-of-way. Section 253(c) also provides for the right to fair and reasonable compensation.

The three decisions petitioner cites as "conflicting" with the instant case are City of Auburn v. Qwest Corp., 260 F.3d 1160 (9th Cir. 2001), cert. denied, 534 U.S. 1079 (2002), overruled in part by Sprint

Telephony PCS v. County of San Diego, 543 F.3d 571 (9th Cir. 2008)(en banc); and Qwest Communications v. City of Berkeley, 433 F.3d 1253 (9th Cir. 2006). Auburn and Berkeley examine the safe harbor provided by section 253(c). Petitioner points to the findings in those cases that regulations requiring an applicant to submit proof of its legal qualifications to offer telecommunications service do not fall within the "safe harbor" of section 253(c). Petition at 9-13. Petitioner further states that under section 253(c) as interpreted in those cases, a municipality cannot consider an applicant's legal qualifications to offer telecommunications service. Id. Petitioner states that Sprint Telephony PCS v. County of San Diego left the Auburn analysis of the scope of 253(c) undisturbed. Petition at 13.

In the instant case, however, the administrative decision of the City was not based on a public record demonstrating lack of qualification to offer telecommunications service. Rather, the City decision was based upon lack of trustworthiness to abide by basic obligations related to management of rights of way and reasonable compensation. The District Court and the Court of Appeals upheld the City's decision. None of the cases cited by petitioner as conflicting with the decision at bar involved facts indicating a demonstrable lack of trustworthiness of the entity seeking to contract for use of the public rights of way. The Ninth Circuit cases analyze the substantive scope of what constitutes "management of rights of way" activity covered by the safe harbor from preemption of section 253(c).

In light of different facts, the decision at bar dealt with a more fundamental issue. The Court of Appeals recognized that no matter how narrowly defined the substantive management of rights of way authority protected by section 253(c) may be, without a base level of trustworthiness on the part of a potential occupant of the right-of-way, there is no way for a local government to reliably contract with such an entity regarding any such management of rights of way related obligations. Thus, the decision is entirely consistent with the Ninth Circuit cases on the scope of section 253(c); it simply dealt with a precondition of contractual trustworthiness that was not presented in the Ninth Circuit cases.

In the case at bar, the Court of Appeals affirmed the District Court's finding that "[a]n isolated refusal to deal with an applicant known for payment defaults and the defrauding of payees is not a 'regulatory barrier to entry or exit.'" Petition at 36a. Unlike in Auburn and Berkeley, the Court in the case at bar never discussed the application process. The Global Court found that under section 253(c), a municipality can consider the public record when denying a franchise to a telecommunications provider on the basis of its ties to organized crime, its past history of fraud, and its debts and arrears. Petition at 36a. The Court found that the City's determination to deny petitioner a franchise falls within the "safe harbor" provision of section 253(c) after considering the evidence of the decision's practical effect. To decide that a municipality cannot consider the legal qualifications of petitioner would require the City of New York to knowingly ignore the guilty plea and admitted ties to organized crime of its

president and sole shareholder as well as the company's history of fraud and its debts and arrears.

(III) Even if, *arguendo*, the Court of Appeals for the Second Circuit were incorrect in its view of the scope of municipal authority under section 253 generally, facts in this case would lead to the same result anyway. Let us assume (contrary to what actually happened) that the Court of Appeals had concluded that petitioner's record of criminal activity would have been beyond the scope of the City's authority to consider in the case of a phone company seeking to install, for example, underground phone lines passively transiting the public rights of way to serve private homes and businesses throughout the community. Petitioner's record of criminal activity would in any event have been within the scope of permitted municipal consideration in this particular case. Petitioner sought not to install phone lines merely transiting through the right-of-way. It sought to install payphones the sole purpose of which is to serve as an amenity to pedestrians on the public right-of-way. The scope of a municipality's "management of rights-of-way" authority is necessarily broader when the intended service itself is to be an amenity serving users of the right of way rather than merely a set of wires that pass through the right of way. Part of a municipality's management of right of way responsibility includes seeking reliable and efficient services to pedestrians and vehicles using such right-of-way. As such, even if petitioner's background and history of fraud and criminal activity were found beyond the scope of municipal "right-of-way management" consideration in cases involving wires passing through the right-of-way,

such matters would be self-evidently with the scope of such right-of-way management consideration in the context of a proposed sidewalk payphone provider.

(IV) In conclusion, the Court of Appeals for the Second Circuit correctly resolved this case. There is no conflict between the decision at bar and the precedents of this Court and the Courts of Appeals. In any event, the decision of the Court of Appeals for the Second Circuit would have been proper on other grounds, regardless of the merits of the actual grounds of the decision.

CONCLUSION

THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI.

Dated: New York, New York
November 9, 2009

Respectfully submitted,

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